

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

THE ASSOCIATED PRESS,	:	FILED UNDER SEAL
Plaintiff,	:	12 Civ. 1087(DLC)(FM)
- against -	:	ECF Case
MELTWATER U.S. HOLDINGS, INC.;	:	DECLARATION OF
MELTWATER NEWS U.S., INC.; and	:	<u>ELIZABETH A. MCNAMARA</u>
MELTWATER NEWS U.S. 1, INC.	:	
Defendants.	:	

Pursuant to 28 U.S.C. § 1746, I, **ELIZABETH A. MCNAMARA**, declare as follows:

1. I am an attorney duly admitted to practice law before the Courts of this state and this United States District Court and a partner of the firm of Davis Wright Tremaine LLP, counsel for plaintiff The Associated Press (“AP”) in the above-captioned action. I submit this declaration in support of AP’s motion for summary judgment against Defendants Meltwater U.S. Holdings, Inc., Meltwater News U.S., Inc., and Meltwater News US1, Inc. (collectively “Meltwater”). Everything contained in this declaration is based on the discovery in this case, as referenced by my citations, or my personal knowledge, except as otherwise indicated.

THE MELTWATER NEWS SERVICE

2. Meltwater operates a commercial, subscriber-only media monitoring service called the Meltwater News service (“Meltwater News”). Meltwater News is a “subscription service for businesses” – not a consumer tool for individuals. Attached as Exhibit 1 are excerpts from the Rule 30(b)(6) Deposition of John Box, taken on September 5, 2012 (“Box Tr.”); see *id.* at 33:5-9; 89:17-21. Attached as Exhibit 7 is a document produced by Meltwater titled “Meltwater News & Google Alerts,” which states: “Google Alerts is a consumer tool while

Meltwater News is a business tool.” (emphasis in original) In its Counterclaims, Meltwater admits that “nearly all” of its U.S. customers are “corporations, non-profit organizations, or government agencies.” Attached as Exhibit 5 is Meltwater’s Amended Answer and Counterclaims (“Ans.” and “Countercl.”); see Countercl. ¶ 2. See also Ex. 1 [Box Tr.] at 87:4-14, 87:22-88:3, 89:6-9. As of June 2012, Meltwater had **RE** U.S.-based subscribers. Attached as Exhibit 6 is Meltwater’s Amended Responses and Objections to Plaintiff’s First Set of Interrogatories (“Meltwater Interrogatory Responses”); see Meltwater Interrogatory Response No. 7.

3. In 2010, Meltwater News U.S. had a total income of approximately **REDACT**; and in the following year, 2011, Meltwater News U.S.’s total income increased to approximately **REDACT**. Attached as Exhibit 8 is a document produced by Meltwater showing high-level financial information for Meltwater News U.S. in 2010 and 2011; see *id.* at MW0127905. The parent company of Meltwater News, the Meltwater Group, brought in total revenue of approximately \$100 million in 2010. Ex. 5, Ans. ¶ 44.

4. Meltwater presents its Meltwater News service as an electronic version of a traditional press-clipping service. Ex. 5, Ans. ¶ 42. Indeed, as explained on its website, Meltwater’s CEO “set out to introduce game-changing technology for the traditional press clipping market,” resulting in the development of Meltwater News. Attached as Exhibit 9 is a screenshot of the above-referenced page from the Meltwater website, titled “Meltwater Group History.”

5. Meltwater identifies among its U.S. “competitors” other clipping services such as BurrellesLuce and Cision (formerly Bacon’s Information), as well as news databases such as Factiva and LexisNexis, and online news portals such as Yahoo! and Google Alerts. Attached as

Exhibits 10-15 are certain documents produced by Meltwater in which the company compares its service to such competitors as Cision, Vocus, BurrellesLuce, Factiva, LexisNexis, Yahoo! and Google Alerts. Attached as Exhibit 2 are excerpts from the Rule 30(b)(6) Deposition of Sara Saab, taken on September 10 and 11, 2012 (“Saab Tr.”); see *id.* at 54:22-55:3 (identifying Vocus, Cision and BurrellesLuce as primary U.S. competitors). See also Ex. 1 [Box Tr.] at 77:23-78:12 (identifying Cision, Vocus, Google News, and BurrellesLuce among primary competitors). In a 2011 “Sales Playbook” produced by Meltwater and attached as Exhibit 21, Meltwater describes a sales agent’s success in convincing a company called Deutsche, Inc., to “change[] their mega-contract from Lexis Nexis to Meltwater News for a cool \$150,000 contract.” *Id.* at MW0003278. Indeed, Meltwater describes itself as providing a “more sophisticated and specialized version of the news monitoring services offered by companies such as Google and Yahoo! via their Google News and Yahoo! News services.” Ex. 5, Countercl. ¶ 3. Many of these Meltwater competitors, including BurrellesLuce, Cision, Factiva, LexisNexis, Yahoo! and Google, are AP licensees. See Declaration of Sue Cross, dated November 8, 2012 (“Cross. Decl.”), ¶¶ 33-39.

6. In exchange for annual subscription fees, beginning at approximately \$5,000-\$6,000 for a basic subscription, Meltwater delivers “fresh, relevant content” throughout the day to customers. Ex. 5, Ans. ¶ 47. Attached as Exhibit 16 is a screenshot from Meltwater’s website which states: “Meltwater News continuously tracks news sources, updating its database continuously throughout the day so searches return fresh, relevant content.”

7. Meltwater News is delivered on a closed platform that can be accessed only with a Meltwater News login. It is available exclusively to paying subscribers, Meltwater employees,

and users with an authorized trial subscription. Ex. 1 [Box Tr.] at 33:10-16; Ex. 2 [Saab Tr.] at 68:6-16.

8. Meltwater does not report, gather, write or edit the news articles. Not surprisingly, therefore, Meltwater employs no reporters. Ex. 1 [Box Tr.] at 14:11-14. Similarly, Meltwater does not rewrite, summarize, or comment on the content that it scrapes from online news sources and delivers to customers. *Id.* at 14:15-21 (Meltwater is “not so concerned with writing news stories”), 14:22-15:2; Ex. 5, Ans. ¶ 56 (“Meltwater does not create its own news articles . . .”). Instead, as more fully explained below, Meltwater’s News Reports are created from scraping news content from Internet sites, indexing that content, and then delivering excerpts of the content to its paying subscribers based upon the subscriber’s previously designated “agents” or keywords reflecting topics of interest. In short, Meltwater is a commercial enterprise that is built almost exclusively on delivering verbatim text from news articles, including AP news, to its subscribers.

FEATURES OF A MELTWATER NEWS SUBSCRIPTION

9. A basic subscription to Meltwater News provides a subscriber with access to Meltwater’s Global Media Monitoring product. Ex. 5, Ans. ¶ 41. Subscribers select a limited number of “agents” or keywords, which are standing queries designed to retrieve relevant news articles from Meltwater’s database on a continuous basis. *Id.* at ¶¶ 47-49. Meltwater’s product lead for Meltwater News testified that the agent is intended to serve as “a realtime resource” for Meltwater users. Ex. 2 [Saab Tr.] at 198:6-8.

10. On a periodic basis, “usually once or twice per day,” Meltwater emails a report titled “News Report from Meltwater News” (“News Report”) to its customers, containing hits on that customer’s “agents.” Ex. 5, Countercl. ¶ 36; see also Exs. 84-86, *infra* ¶ 95 (attaching

examples of Meltwater News Reports). In addition to receiving News Reports once or twice a day, customers may receive reports on an “as it happens” basis. Attached as Exhibit 3 are excerpts from the Rule 30(b)(6) Deposition of Sebastian Geidies, taken on October 3, 2012 (“Geidies Tr.”); see *id.* at 74:25-75:13.

11. For each article in a customer’s daily News Report, Meltwater includes the headline, verbatim opening text, and a “hit sentence” containing one of the customer’s keywords, along with a link to the full article. Ex. 5, Ans. ¶ 48; see also Ex. 2 [Saab Tr.] at 109:3-15 (agreeing that Meltwater delivers part of the “actual content” from an article). The opening text includes up to 300 characters, and the hit sentence includes an additional 140 characters, plus the final word in the excerpt. Ex. 6, Meltwater Interrogatory Response No. 8. The opening text generally constitutes the first sentence or two of each article, which is known as the article’s “lede.” The character counts do not include the headlines. See *id.*

12. Meltwater does not organize its News Reports by articles that are most relevant to a customer’s search queries or by articles from the most prominent news organizations. Instead, the articles are presented in reverse chronological order, with the most recent articles appearing at the top of the report. Ex. 3 [Geidies Tr.] at 91:19-92:6; Ex. 2 [Saab Tr.] at 277:1-20 (“Just because . . . the Economist is more prominent than the San Luis Obispo Town Crier, it won’t rise to the top. The one that will show up listed is the most recent.”). Indeed, even though the third-party software used by Meltwater offers the ability to present hits sorted by “relevance,” Meltwater does not employ this functionality in its Meltwater News service. Ex. 3 [Geidies Tr.] at 93:5-94:8 (“We have the theoretical ability to sort based on relevancy to that query but we don’t use it.”).

13. Meltwater displays the article's opening text, or lede, to users regardless of whether the opening text contains any terms selected by the user. Ex. 2 [Saab Tr.] at 189:10-15 ("The match key words may or may not appear in the opening text."). According to Meltwater's witnesses, Meltwater delivers this opening text in order to provide "context" so that the customer "know[s] what the article is about." Ex. 1 [Box Tr.] at 154:18-155:10; Ex. 2 [Saab Tr.] at 190:13-19.

14. Nor does Meltwater adjust the amount of text displayed based on the length or nature of the article delivered, be it editorial, humor, opinion, breaking news, or investigative journalism. Ex. 2 [Saab Tr.] at 185:11-19 ("[T]he system doesn't know anything about the type of the article.") Although customers could choose to receive only the headline, or only the headline with the opening text, Meltwater's witnesses testified that "[t]he default settings are to display all three categories" and "most clients do have all three of them." Ex. 1 [Box Tr.] at 154:2-6 ("Most clients do have all three of them, the headline, the opening paragraph, and the hit sentence. I can't remember any specific reasons a client has had for not wanting all of the text."); Ex. 3 [Geidies Tr.] at 86:17-87:12 ("The default settings are to display all three categories. Title, ingress and hit sentence. . . . Based on my experience and my speculation most customers don't change that.").

15. In addition to receiving emailed News Reports on at least a daily basis, Meltwater customers can log into Meltwater's password-protected site to review all hits returned for their selected agents for the past six months. Ex. 5, Ans. ¶ 49. As in the News Report, Meltwater displays on its platform the same headline, opening text, and hit sentence for each article up to 440 characters, and the articles are presented in reverse chronological order. Attached as Exhibit 17 is a screenshot of the "agent" tab produced by Meltwater, showing that articles are displayed

in reverse chronological order. See also Ex. 3 [Geidies Tr.] at 57:17-24; Ex. 6, Meltwater Interrogatory Response No. 8.

16. Because AP sends its news articles to its approximately 1,400 members, numerous AP members and other AP licensees publish the same AP article. Where the Meltwater system determines that it has duplicate articles from multiple sources – as would often be the case with AP articles – it displays the article with the most recent timestamp to the user. The user then must click on a plus-sign icon to see an expanded view displaying all duplicate entries for that article. Ex. 3 [Geidies Tr.] at 63:8-64:18.

17. Meltwater allows its customers to target article hits from particular publications or groups of publications within the Meltwater platform. For example, a user could choose to receive hits only from a pre-designated set of “USA Top Sources” – a list that includes AP and several AP-member publications. Ex. 5, Ans. ¶ 52; see also Declaration of Keri McKenzie, dated November 7, 2012 (“McKenzie Decl.”) ¶ 20, Ex. 49. Meltwater users can also choose to target articles only from specific identified publications, or only from publications in a particular geographic region. Ex. 3 [Geidies Tr.] at 166:21-167:20.

Meltwater News Acts as a Substitute for the Excerpted Articles

18. Meltwater News is designed and promoted as a “news digest” that allows customers to save time and save copyright fees. In proposals to prospective clients, Meltwater Meltwater specifically advertises that there are “no copyright fees” when receiving content through the Meltwater News platform. Attached as Exhibit 18 is an email produced by Meltwater from Meltwater sales consultant David Houston to a potential customer, attaching a “Meltwater News Proposal”; see *id.* at MW0026269. See also McKenzie Decl. ¶ 19, Ex. 48.

19. The evidence from Meltwater also demonstrates that the amount of content delivered by Meltwater acts as a substitute for reviewing the full articles. Meltwater's daily reports are titled "News Reports," and its employees refer to its excerpts as "news digests." Attached as Exhibit 19 is an email chain in which Meltwater employee Drew Howells tells a potential client: "[M]any clients like yourself use us as a time saver and a way to get a comprehensive, customized news digest to the appropriate people internally." *Id.* at MW0053925 (emphasis in original). See also *id.* at MW0053923 (email stating that "[t]he number one reason our clients subscribe to us is because we provide the most news in the most efficient manner"); Ex. 1 [Box Tr.] at 142:10-24. As noted above, Mr. Box testified that Meltwater delivers the opening text of every article – regardless of whether it contains a customer's keyword – to give the user "context" for understanding what the article is about. *Id.* at 154:18-155:10. Perhaps most telling, Meltwater produced a "handbook" written by a Meltwater client relations representative that recommends telling customers that the news excerpts provided by Meltwater "not only saves you time so you don't need to read the full article but saves companies a LOT of money because of copyright fees." Attached is Exhibit 20 is a May 7, 2010 email produced by Meltwater from Meltwater client relations representative Josh Jahner with the subject line "Josh HAND BOOK." See *id.* at MW0062084.

20. Despite these admissions, Meltwater claims that its customers primarily use Meltwater News to identify "mentions" of their company or product, rather than for news and information. However, Meltwater concedes that it has no systematic evidence of such customer behavior, and it admits that customers could also be using the service to receive breaking news and "keep abreast of news developments" – and that such uses would be a "valid way to use the system." Ex. 2 [Saab Tr.] at 386:6-9, 389:5-390:12, 390:18-391:7, 392:11-22.

21. In fact, although a limited number of Meltwater's clients may sometimes use Meltwater News merely to determine whether their press releases have been picked up by news outlets, there is extensive evidence suggesting that many Meltwater News customers frequently use the service and the excerpts delivered by Meltwater for their news and informational value.

22. This is perhaps best evidenced by a review of the search terms employed by Meltwater News customers. As evidenced in the Spreadsheets produced by Meltwater and described below in Paragraph 73, the search terms selected by Meltwater News customers evidence that they are using the service to review breaking news, industry trends, and news coverage of issues of interest to them. A few examples demonstrate the point:

- a. **REDACTE** a nutritional products company, has an agent called "Anti-Doping," which includes the terms "athletes" and "anti-doping rules" (Ex. 55 at Tab "Ex. J," Line 42, Columns F and I);
- b. **REDACTED** has agents called "Iran" (including the term "Iranian") (*Id.* at Tab "Ex. R," Line 213, Columns F and I) and "Wolesi Jirga" (including the terms "parliament" and "Afghanistan") (*Id.* at Tab "Ex. L," Line 98, Columns F and I);
- c. **REDACTE**, a 501(c)(3) organization that "advances freedom around the world by supporting democratic change, monitoring freedom, and advocating for human rights," has an agent called "activists," which includes the terms "human rights" and "activists" (*Id.* at Tab "Ex. N," Line 220, Columns F and I; *Id.* at Tab "Ex. R," Line 211, Columns F and I);

- d. **REDA** – Lambert International Airport has an agent called “Aviation – Top 100 Sources,” which includes the term “aviation” (*Id.* at Tab “Ex. N,” Line 230, Columns F and I);
- e. **REDACTED** has an agent called “Sandusky,” which includes the term “Sandusky” (*Id.* at Tab “Ex. S,” Line 356, Columns F and I);
- f. **REDACTED** has agents named “National Industry News” and “Local Industry News,” which include the term “health care” (Ex. 56 at Tab “Ex. EE,” Lines 663 & 664, Columns E and H);
- g. The tobacco company **REDACTE** has an agent called “Tobacco Legislation and Regulation – US” which includes the terms “cigarette,” “law,” “smoking,” “tobacco,” and “FDA” (*Id.* at Tab “Ex. GG,” Line 582, Columns E and H); and
- h. **REDACTE** has an agent called “Retail trends,” which includes the terms “fashion” and “trends” (*Id.* at Tab “Ex. JJ,” Line 780, Columns E and H).

23. Meltwater’s product and marketing materials also demonstrate that Meltwater markets its Meltwater News service to customers as a tool to stay abreast of breaking news or to obtain historical information of interest. See Ex. 10 (in comparison of Meltwater News to BurrellesLuce, stating that Meltwater News’ unlimited search terms “allows you to maximize the service’s potential by searching for yourself on any of your products, all of your competitors, industry news, and unlimited research topics, etc.”). The 2011 “Sales Playbook” for Meltwater News includes the following “tip” in its “Ten Tips to Selling Meltwater News”: “If they say that

they only monitor their own name with the press clippings, this is a great chance to politely inform them that we do not charge per keyword or article – they could monitor a lot more with us. ‘*Just to let you know, unlike most press clipping companies, we do not charge per article or per keyword so if you wanted to look for competitors, industry news, etc you could do so and it does not cost any extra . . .*’’ Ex. 21 at MW0003272 (italics in original).

24. Similarly, in sales pitches and proposals to potential customers, Meltwater highlights its ability to track not just mentions of the company, but also broader news of interest. Attached as Exhibit 22 is an email produced by Meltwater in which a Meltwater sales consultant tells a potential client from the Vince Gray for Mayor Campaign that other “campaigning clients” use Meltwater News to “[t]rack hot topics on local news (issues, legislation, and city concerns).” *Id.* at MW0089620. Attached as Exhibits 23 and 24 are emails produced by Meltwater in which Meltwater sales consultant David Houston tells prospective clients that Meltwater News can be used to deliver “company news, competitor information and industry trends.” See Ex. 23 at MW0004053; Ex. 24 at MW0004475. Attached as Exhibit 25 is an email produced by Meltwater in which Mr. Houston tells a potential client that Meltwater News “work[s] with multiple Banking Associations who not only value tracking their name but also taking a look at industry headlines.” *Id.* at MW0004647. Mr. Houston’s emails included a statement describing the company’s purpose as helping companies “keep track of business critical information published online.” *Id.* at MW0004650; see also Ex. 23 at MW0004056, Ex. 24 at MW0004479. Attached as Exhibit 4 are excerpts from the Deposition of David Houston, taken on October 2, 2012 (“Houston Tr.”); see *id.* at 48:2-20 (acknowledging statement in signature block as an “accurate description” of Meltwater News). See also Ex. 95 (Meltwater proposal to the U.S. House of Representatives, discussed more fully at Paragraph 107), which

suggests agent topics such as “district news, relevant committee news, Congress headlines” and describes Meltwater’s search tool as “an alternative to creating new Agents for research.” *Id.* at MW0042625-26. Attached as Exhibits 26-28 are examples produced by Meltwater of Meltwater News “Service Breakdowns” sent to prospective customers, which suggest using the Meltwater platform to track topics such as “competitors,” “industry trends,” “key issues,” and “legislation/regulation.” See Ex. 26 at MW0008325; Ex. 27 at MW0005617; Ex. 28 at MW0005884.

25. The capabilities of the Meltwater platform are not different in nature from the capabilities offered by AP to its licensees through the AP Exchange platform. As set forth in the Cross Declaration, the AP Exchange platform offers Boolean search technology and other filtering abilities for licensees to search through content licensed from and delivered by AP. AP also works with licensed third-party partners, including InfoDesk, LexisNexis, and Factiva, to deliver licensed AP content through platforms with sophisticated search capabilities. Cross Decl. ¶¶ 61-65.

Ad Hoc Searches

26. Meltwater also allows users to perform “unlimited” ad hoc search queries to retrieve content from the Meltwater News database. Ex. 5, Ans. ¶ 50; Ex. 2 [Saab Tr.] at 199:10-14 (testifying that “there’s no limit” to the number of ad hoc searches that a customer can do). Unlike agent queries, ad hoc searches are not restricted to hits from the past six months; instead, users can retrieve hits from articles going back to approximately 2001. Ex. 3 [Geidies Tr.] at 104:4-11. Meltwater admits that this “ability to go back in time” with its platform is a selling point for its service. Ex. 1 [Box Tr.] at 120:20-22. In response to ad hoc queries, as with agents, Meltwater displays the headline, opening text, and hit sentence from the article, up to

approximately 440 characters (not counting the headline), plus the final word in the excerpt. Ex. 6, Meltwater Interrogatory Response No. 8. (The Meltwater News Reports, the search results displayed under the Agents tab on the Meltwater platform and the ad hoc search queries shall be collectively referred to as the Meltwater “Media Monitoring Materials.”)

27. Meltwater delivers article hits from its database in response to a user’s ad hoc query even when the article is no longer freely available on the Internet at the time of the query. In this situation, known as a “dead link,” the link from the article hit no longer directs the user to the full text of the article at the source website, either because the article has moved behind a paywall or it has been removed from the site altogether. Ex. 3 [Geidies Tr.] at 235:7-13, 236:24-237:17. Even where an article hit contains a “dead link,” a user will still receive the headline, opening text, and a portion of the article’s body text containing the user’s ad hoc keyword before clicking on the link and discovering that the article is no longer available at that location. *Id.* at 241:18-242:2 (“A: So you are asking whether a customer doing an ad hoc search gets displayed a hit sentence before clicking on a link and finding out that the link is dead? Q: Exactly. A: Yes. The customer would see the hit sentence before he or she clicks on the link.”); see also Ex. 5, Ans. ¶ 61 (admitting that “Meltwater News’s search function allows Meltwater users to conduct ad hoc searches for, and retrieve the headline, short snippet, and link to the URL for the webpage of, ‘many older articles’”); McKenzie Decl. ¶ 13.

28. Meltwater’s ad hoc searching also can retrieve additional content from articles already delivered to a customer in a News Report or made available to the customer under its agent tab on the Meltwater News platform. In other words, because a Meltwater customer can run unlimited ad hoc searches, it is possible for the customer to retrieve several additional hit sentences from the same article retrieved in response to an agent query – or in earlier ad hoc

searches. Ex. 3 [Geidies Tr.] at 119:23-24 (“One article can be returned in response to different queries, yes.”); Ex. 2 [Saab Tr.] at 361:15-22 (“Depending on their search query, different hit sentences will appear.”) For example, as explained in the McKenzie Declaration, AP’s counsel’s agent was able to receive additional “hit sentences” from short, breaking AP news stories using the ad hoc searches on top of the excerpts received in the morning Meltwater News Report. McKenzie Decl. ¶ 12. Attached as Exhibits 29-36 are highlighted copies (prepared by our firm) of the Registered Articles listed in Paragraph 12(a)-(h) of the McKenzie Declaration, illustrating the portions of each Registered Article delivered to the James Mintz Group through the Meltwater News platform as set forth in Paragraph 12(a)-(h) of the McKenzie Declaration and the exhibits referenced therein. As is evident from these exhibits, where a customer subsequently runs a search for a term that happens to appear in a different paragraph, the customer’s combined searches could end up retrieving nearly all of the article. See also *infra*, ¶ 99.

Customer Archives

29. Another feature promoted by Meltwater is that as part of its basic Meltwater News Global Media Monitoring package, Meltwater offers customers the ability to save particular article hits in customer archive folders. As long as the customer remains a Meltwater subscriber, the customer can archive an unlimited number of article hits for an unlimited amount of time, at no additional cost. The contents of customers’ archives are not stored locally on the customer’s hard drive; instead, these are stored by Meltwater and accessed by logging into the Meltwater platform. Ex. 5, Countercl. ¶ 44 (“A customer’s archived search results are stored on Meltwater’s system in private folders”). Meltwater customers “can access the material saved in their Archive for as long as they remain Meltwater subscribers.” Ex. 5, Ans. ¶ 64.

Attached as Exhibit 37 is an email produced by Meltwater from a Meltwater senior account manager to a potential client, attaching a proposal promising “unlimited archiving (all on our servers)” and a pricing sheet offering “[u]nlimited space on our server for your archives.” *Id.* at MW0062699, MW00062701.

30. Meltwater markets its “unlimited archiving” feature to customers and prospective customers. For example, in a “Meltwater News – Sole Source Letter” produced by Meltwater and “[p]repared for the DC Public Schools” (attached as Exhibit 38), Meltwater listed its “unlimited archiving facility” as a “factor that set[s] Meltwater apart from the rest,” stating: “The Meltwater archive is limitless meaning unlimited folders can be created to store unlimited amounts of articles. The archive is accessible to all users at all times from any computer with internet access. Everything is stored and backed up on our network, meaning our clients need not use any space on their personal hard drives.” *Id.* at MW0115491.

31. Meltwater also points to its unlimited archiving function as a feature that sets it apart from competitors – many of whom are AP licensees that agree to restrictions that prevent the very archiving Meltwater promotes. In internal training presentations, for example, Meltwater lists its ability to “store articles inside the platform indefinitely” as a feature that sets it apart from its competitor Cision, which has a “limited archiving capability (60/90 days).” Ex. 15 at p. 5. Meltwater gains this competitive advantage because it does not license its content and ignores the terms of use on the websites it scrapes to obtain the content it sells. As set forth in the Cross Declaration, AP restricts licensees from archiving its content, including Cision, and its Digital Use Agreement with members likewise restricts archiving. Cross Decl. ¶¶ 14, 44-49.

32. Compounding this problem is the fact that Meltwater’s archiving feature includes an “Article Editor” tool, which gives customers the ability to store the full text of articles in their

customer archives. Ex. 2 [Saab Tr.] at 208:2-10; Ex. 1 [Box Tr.] at 166:19-20 (“[T]he system has the technology to input full text into it.”), 178:4-9 (testifying that “inside the system there is an ability to put full text into the article editor”). As with all archived material, content added with the Article Editor is stored in the user’s archive on the Meltwater platform. Ex. 5, Countercl. ¶ 47 (“The text that the customer chooses to enter into the various fields of the Article Editor pop-up box is then stored at the customer’s direction in the customer’s Archive.”).

33. Approximately a month *after* being served with the Complaint in this litigation – on or about March 20, 2012 – Meltwater implemented a “pop-up box” that would appear any time a customer sought to add more than 30 words of text to a Meltwater archive using the Article Editor tool. *Id.* at ¶ 65. According to Meltwater, the new pop-up box “remind[s] . . . users of Meltwater’s terms of service” and prompts the user to check a box confirming that the user has sufficient rights to the content she is seeking to add to the archive. *Id.* at ¶ 65; Ex. 2 [Saab Tr.] at 38:22-24. Attached as Exhibit 39 is a screenshot produced by Meltwater showing this new pop-up box.

34. Prior to this litigation, Meltwater did not prompt users to confirm their rights to save any amount of content using the Article Editor. Ex. 2 [Saab Tr.] at 69:19-70:5 (confirming that the pop-up box didn’t exist prior to the litigation). Despite adding the “pop-up-box,” the Article Editor tool’s underlying functionality remains the same; as long as the user checks the new box, the user can continue to upload content exceeding 30 words. *Id.* at 39:7-10 (“To my knowledge, the business logic in the United States has remained the same before and after the . . . lawsuit was filed, apart from that pop-up box.”), 34:21-36:12 (explaining “business logic” to mean “the behavior of the system in terms of what we show and what a user can do”); Ex. 1

[Box Tr.] at 327:17-24 (testifying that customers have to tick the box before inputting the larger excerpt, but no awareness of whether Meltwater monitors compliance with that checkbox).

Translation Feature

35. Meltwater also offers customers the ability to translate articles using translation software that it has licensed and makes available to users on the Meltwater platform. Ex. 3 [Geidies Tr.] at 122:5-6. When a user clicks on the translate icon, the translated article appears within a frame on the Meltwater site page. *Id.* at 121:7-11. The translation function translates the full text of the article. Ex. 1 [Box Tr.] at 191:24-192:3.

Dashboard Analytics

36. Upon logging into the basic Meltwater platform, the customer sees a “dashboard” tab with “a few bits of graphical analysis” presented through basic widgets. Ex. 2 [Saab Tr.] at 398:15-23. The dashboard widgets consist of aggregated displays about basic attributes such as a world map showing geographic coverage and number of article hits, and their presentation does not incorporate – or require the delivery of – excerpts from the underlying articles. Attached as Exhibit 40 is a screenshot produced by Meltwater showing the “dashboard” display from the Meltwater platform. Attached as Exhibit 41 is a document produced by Meltwater titled “mNews v3 Dashboard Design,” which describes the dashboard features and includes screenshots of the dashboard widgets.

37. More specifically, in the top left corner of the “dashboard” tab, a customer can see a “snapshot of the number of clips or hits” on a particular agent. Ex. 4 [Houston Tr.] at 95:5-11. In the top right corner, a customer can see either a “snapshot of sentiment” – represented by a fuel tank widget with an arrow pointing to red or green to indicate whether coverage on a particular agent has been “mostly positive, mostly negative, or mostly neutral” – or a “word

cloud” displaying “common buzz words” from coverage of a particular agent. Ex. 2 [Saab Tr.] at 398:11-23, 399:8-401:19; Ex. 4 [Houston Tr.] at 95:5-11, 105:23-106:4. In the bottom left corner, a customer can see a list of the top 5 publications covering a particular agent. Ex. 2 [Saab Tr.] at 403:1-11. In the bottom right corner, a customer can see a global “heat map” showing density of coverage by geographic areas for a particular agent. *Id.* at 403:24-404:7; Ex. 4 [Houston Tr.] at 95:5-11.

38. By default, these dashboard analytics are *not* included in the emailed News Reports. A customer may choose to have a few “simple statistics” included in their News Reports once a week, namely a “choice of up-and-down coverage or a word cloud,” plus a “pie chart” showing “the top three or four countries” that have covered a particular agent. Ex. 2 [Saab Tr.] at 399:3-7, 404:8-17.

39. Meltwater sales consultant David Houston testified that it was his understanding that the dashboard analytics are not important to prospective customers, and that the dashboard “snapshot of analytics” is “not a primary or central function of the main dashboard or of the basic platform.” Ex. 4 [Houston Tr.] at 105:14-18, 111:4-24. Houston also testified that he tells customers to take the dashboard analytics reflecting Meltwater’s “sentiment analysis” with a “grain of salt.” *Id.* at 103:2-12.

40. Meltwater does provide its customers with the option of purchasing somewhat more sophisticated analytics, but at a cost. For an additional fee, users can choose to supplement their basic subscription with Meltwater’s Analytics function. Ex. 1 [Box Tr.] at 49:19-25. Meltwater admits that of its **RE** U.S.-based subscribers to Meltwater News, only **RE** – or **REDA** – of these customers subscribe to the stand-alone Analytics feature. Ex. 6, Meltwater Interrogatory Response No. 7.

Newsletter and Newsfeed Functions

41. Meltwater customers can also subscribe to Newsletter and Newsfeed functions as add-on components to its basic media monitoring product. Ex. 1 [Box Tr.] at 49:11-25.

42. Meltwater's Newsletter function allows subscribers to distribute content through the Meltwater News platform to an unlimited number of third-party recipients. Attached as Exhibit 42 is a Meltwater response to a Request for Media Monitoring Services from the D.C. Lottery and Charitable Games Board, produced by Meltwater; see *id.* at MW0115490 (“Meltwater News allows you to create an unlimited number of e-newsletters that can be sent to multiple distribution lists, all with unlimited recipients.”) See also Ex. 95 at MW0042629 (Newsletter allows client to “create a branded e-newsletter containing relevant articles, and distribute the news to unauthenticated users via e-mail”); Ex. 1 [Box Tr.] at 158:13-17 (“Q: Does Meltwater place any limitation on who can receive newsletters created by a client? A: No, I don’t believe we place limitation on that.”), 165:18-166:7. In addition, the Newsletter function does not limit the number of characters or the amount of text that can be included in a customer newsletter. Ex. 1 [Box Tr.] at 166:19-20 (“[T]he system has the technology to input full text into [a newsletter].”) Meltwater promotes this function to its customers as the ability to create and distribute “branded” newsletters. Thus, the news excerpts from AP and other news stories are distributed under the corporate brand of the Meltwater customers. *Id.* at 172:12-18.

43. Documents produced by Meltwater evidence that Meltwater employees encourage customers and potential customers to use the Article Editor tool to include the full text of articles in newsletters that the customer will then disseminate to third parties. Attached as Exhibit 43 is an email from Meltwater sales consultant David Houston, produced by Meltwater, in which Mr. Houston writes to a potential customer: “While no service in the industry can provide the full-

text version of restricted sites, there are a number of solutions which my clients find very helpful. Specifically, the Newsletter allows users to upload the full text of any external content directly to the Platform (whether it be subscription or internally produced content). If you or any member of your team has a subscription to a specific source, then the full text article can be easily included” Attached as Exhibit 44 is an email chain produced by Meltwater in which Meltwater employee Paul Toomey describes how he “[c]opied huge amounts of article text (all of it in some cases)” into a customer archive in order to create a sample newsletter and explains to Meltwater employee Samantha Monk that “to get full article content you need to copy the content from the article into the comment feature in the archive folders.” See *id.* at MW0092047. See also Ex. 42 at MW0115490 (“Meltwater News allows you to create an unlimited number of e-newsletters that can be sent to multiple distribution lists, all with unlimited recipients. DC Lottery would have the ability . . . to insert entire articles/press releases within the body of the newsletter.”).

44. Meltwater’s Newsfeed function allows subscribers to post a stream of content – including AP content – supplied by the Meltwater News platform on an internal or external website for viewing by third parties or the public at large. See Ex. 95 at MW0042628 (“The newsfeed tool serves as a way for unauthenticated users or a mass population to view articles harvested through Meltwater News.”); Ex. 1 [Box Tr.] at 182:9-183:3. Meltwater promotes its Newsfeed function as a means to draw people to customers’ websites and to keep them coming back to get updates. See Ex. 37 at MW0062703 (“Incorporating a newsfeed onto your website will result in more hits and a higher percentage of returning visitors. . . . Posting third-party articles on your site adds credibility to your site, your brand, the cause you support, the product or service you sell, the technology you use, et cetera.”)

MELTWATER'S DATABASE OF NEWS CONTENT

45. Meltwater compiles its Meltwater News database by crawling over 162,000 news sources with online websites. Ex. 5, Countercl. ¶ 32. Meltwater does not crawl every page on the Internet to build its database; instead, it individually selects the sources that it chooses to crawl. Ex. 3 [Geidies Tr.] at 144:14-21.

46. Meltwater engineers configure the settings for each source that Meltwater crawls. Meltwater engineers are instructed to name the source using its full name in order to make it easier for customers to target particular sources. Attached as Exhibit 45 is a “Source Configuration Guide” produced by Meltwater; see *id.* at MW0126221. See also Ex. 3 [Geidies Tr.] at 174:23-175:3 (“One of the reasons for the naming convention that we have to use full names is to help the user to be able to select sources to search in or to exclude sources from being searched in.”) To verify the accuracy of the source name, Meltwater engineers are instructed to visit the website of the news source. Ex. 45 at MW0126220.

47. Meltwater’s source configuration guide also describes “enforc[ing] a consistent naming convention” for “Associated Press sources” by adding the parenthetical “(AP)” to any sources that Meltwater identifies as an Associated Press source. The guide states that a purpose for this “consistent naming convention” is “so this can easily be searchable as a collective list in the News Service” and to ensure that “people can do a content specific search on these sources.” *Id.* at MW0126222. The guide also states that the naming convention for Associated Press sources enables Meltwater to “help clients and sales alike to see that we are picking up from these [sources].” *Id.* Hits from these sources appear with an “(AP)” designation in the source name even when the story is not an AP story, but is published by an AP member – which has led to confusion for at least one customer. Attached as Exhibit 46 is an email produced by

Meltwater from a Meltwater customer with the subject line “question about appearance of (AP) in clipping reports.” See *id.* at MW0060099. See also Ex. 2 [Saab Tr.] at 321:13-322:15.

“Real Time’ Distribution

48. On its website, Meltwater promises to deliver “real time information.” Ex. 16. To accomplish this, Meltwater represents that it “continuously tracks news sources, updating its database continuously throughout the day so searches return fresh, relevant content.” *Id.*

49. The default setting for Meltwater’s crawlers is to visit sites approximately every 30 minutes. Ex. 3 [Geidies Tr.] at 148:21-149:3. Meltwater calibrates the frequency of its crawlers depending on the source. Where a source “has a high frequency of putting up new news content,” Meltwater crawls that source more often. If the source does not frequently put up new news content, Meltwater crawls that site less frequently. *Id.* at 148:12-19.

50. Meltwater states that it can “deliver news immediately after its publication,” and claims that “[n]o other provider can deliver news in real-time this way.” Attached as Exhibit 47 is a “Meltwater News – Sole Source Letter” produced by Meltwater and “[p]repared for the Office of Science – Department of Energy,” in which Meltwater claims that these characteristics “set Meltwater apart from the rest.” See *id.* at MW0093954-55. Meltwater is able to fulfill this promise because within “a couple of minutes” after the crawler picks up content, it is available to be delivered to customers on the Meltwater platform. Ex. 3 [Geidies Tr.] at 79:14-25, 81:5-82:21.

51. Meltwater customers can see this continuously-updated content by logging into the Meltwater site throughout the day, where “new hits [are] distributed to that agent continuously.” *Id.* at 101:8-16; Ex. 2 [Saab Tr.] at 192:24-193:9 (“[A]ny agents they have, the results will collect in that media monitoring platform while those agents exist.”). Meltwater

customers can also opt to receive “as-it-happens” News Reports. Ex. 3 [Geidies Tr.] at 75:10-13; Ex. 2 [Saab Tr.] at 160:7-161:3. There is no limit on the number of “as-it-happens” email reports a customer can receive in any given day. Ex. 3 [Geidies Tr.] at 79:8-13.

52. Meltwater touts its “as-it-happens” News Reports as a “crisis management option” for “circumstances where up-to-the minute information is crucial.” Ex. 47 at MW0093955. See also Ex. 2 [Saab Tr.] at 160:7-161:3 (“Most people reserve it for . . . things that are of particular interest that they need to know right away.”)

Meltwater’s Growing Database of “Free” Content

53. Meltwater’s database is continuously expanding, both in terms of the number of sources and its retroactive coverage. Meltwater’s database contains entries for “millions of articles,” and customers can receive hits from articles dating back to 2001, when Meltwater began indexing content. Ex. 3 [Geidies Tr.] at 104:4-11 (for ad hoc searches, “[w]e have an index back to 2001 when Meltwater News was first marketed”); Ex. 26 at MW0008325 (customers have “access to Meltwater News’ archive containing millions of articles dating back to 2001”); Ex. 5, Countercl. ¶ 5 (“Meltwater News’s search index contains information about millions of news items . . .”).

54. Virtually this entire database is made up of unlicensed news content. In very limited occasions, Meltwater enters into agreements with sources to crawl their content. AP requested all such agreements in discovery. In response, Meltwater produced only an agreement with the **REDACTED** (a U.K. publication) and an unexecuted document concerning the **RE** **REDACTE** but Meltwater confirmed it had no executed version.

55. Where a source requires a user to log in without payment, Meltwater will obtain login credentials and crawl the content for the Meltwater platform. Where a source requires

payment for a login, Meltwater decides whether to obtain a subscription or otherwise negotiate terms for crawling that source. Ex. 3 [Geidies Tr.] at 189:7-190:8. Meltwater will provide article hits from this premium source, but the user must log in to the source website to see the full article at the link provided from such sources. *Id.* at 192:11-19.

56. It is not surprising that Meltwater has so few license agreements. Meltwater has a corporate policy of not paying for content that is “freely available” on the Internet. Its negotiations with *The New York Times* are illustrative. In or around November 2011, *The New York Times*, following its implementation of a paywall, informed Meltwater that it would not be allowed to scrape and sell content from the site without paying a license fee. *The New York Times* sought a licensee fee of approximately \$500,000 for Meltwater to continue crawling *The New York Times* site for content to deliver to Meltwater customers. Ex. 1 [Box Tr.] at 214:25-215:7. In an internal email produced by Meltwater and attached as Exhibit 48, David Fallon, the Meltwater product manager directly engaged in negotiations with the *Times*, wrote: “We very rarely pay for content (it’s not scalable across 100,000 sources), we feel that by directing traffic to original content there is already a mutually beneficial relationship with no need for payment.” *Id.* at MW0088528. However, the “mutually beneficial” relationship theory proved faulty. As negotiations with the *Times* proceeded, Meltwater performed an analysis of the “click-through” rate to *New York Times* articles and Meltwater’s co-founder, Jens-Peter Glittenberg, reported that “[t]he numbers of NYT click-throughs are surprisingly low.” The November 10, 2011 email from Mr. Glittenberg produced by Meltwater is attached as Exhibit 49.

57. Ultimately, Meltwater declined to pay the amount requested by the *New York Times* and stopped crawling *The New York Times* site directly from that point forward. Ex. 1 [Box Tr.] at 195:12-196:5, 211:23-212:12. On November 9, 2011, Mr. Fallon distributed a

suggested email for Meltwater area directors to “forward to their teams,” explaining that Meltwater “will not be monitoring news from the New York Times . . . as a result of The New York Times requesting a substantial sum of money from Meltwater in return for being able to crawl their website.” The email continues: “Meltwater does not pay for content that is freely available online, and therefore we felt that the request for payment did not represent good business value to Meltwater or to our clients.” Attached as Exhibit 50 is an email chain produced by Meltwater containing Mr. Fallon’s above-referenced email; see *id.* at MW0122768. In a subsequent internal email, Mr. Fallon explained further: “They wanted REDA We will never pay that amount. It doesn’t make business sense, and contradicts the fact that we don’t think you should pay for freely available content.” *Id.* at MW0122767. Despite this, Meltwater continued to promote the availability of *The New York Times* to potential customers in its list of “Top Tier” publications as of December 2011. *See* McKenzie Decl. Ex. 49.

Meltwater Selectively Chooses to Ignore Robots.txt Instructions

58. Meltwater does not have a uniform practice of abiding by instructions from a site owner contained in a “robots.txt file” on a source website. As explained more fully in the Declaration of Joy Jones, dated November 6, 2012 (“Jones Decl.”), a robots.txt file contains instructions to automated crawlers – identified within the robots.txt file as “user agents” – visiting the website. A robots.txt file can state that particular sections of a site are off-limits to all user agents, or it can state that certain user agents are not allowed to crawl either particular sections or the entire site. Jones Decl. ¶¶ 42-47; Ex. 3 [Geidies Tr.] at 198:3-19, 198:24-199:6, 200:16-201:7. The robots.txt protocol can only restrict crawling of content that is segregated in a particular directory or identified with a particular URL pattern on a website. Ex. 3 [Geidies Tr.] at 200:16-201:7 (for a robots.txt exclusion to work, “[i]t needs to identify a certain directory or a

pattern that is found in the URL . . . if it cannot be identified as a certain content type via the URL, then to my understanding of the robots.txt protocol it cannot be excluded by robots.txt"). Furthermore, the robots.txt file "doesn't create a technical boundary to crawling"; instead, it contains instructions that crawlers can choose to follow or ignore. *Id.* at 203:5-16. When Meltwater engineers configure the settings for Meltwater to crawl a particular source, one of their options is to set whether the crawler should "skip" a site's "robots.txt" page. Ex. 45 at MW0126224; see also Ex. 3 [Geidies Tr.] at 208:3-22. Meltwater claims that where a robots.txt files is used to "exclud[e] only certain user agents," Meltwater "reserves the right not to follow [robots.txt] instructions in this case." Ex. 3 [Geidies Tr.] at 209:22-210:3.

Meltwater's Practices Are Inconsistent With Their Own and Other's Terms of Use

59. In connection with their subscription to the Meltwater News service, Meltwater customers receive a copy of Meltwater's "General Terms and Conditions of Use." Ex. 2 [Saab Tr.] at 63:18-64:23. In response to AP's request for "one copy of each standard U.S. customer contract for the Meltwater News Service," Meltwater produced both a 5-page and a 2-page version of these terms of use. Attached as Exhibit 51 are the "General Terms and Conditions of Use" produced by Meltwater at MW0003630-34 ("Long-Form Terms of Use"). Attached as Exhibit 52 are the "General Terms and Conditions of Use" produced by Meltwater at MW0003637-38 ("Short-Form Terms of Use."). Documents produced by Meltwater indicate that both the short-form and long-form terms of use could be used with customers. Attached as Exhibit 53 is an email to Meltwater employees attaching the Short-Form Terms of Use that had been "recently released" by Meltwater's "newly formed legal-team" and stating: "You will NOT be penalized for using our current, longer version of T&Cs. These will still be accepted." *Id.* at MW0122185.

60. Meltwater's witnesses testified that in general they believe terms of use are "important" and that "all companies should where possible follow the laws and rules in the terms of use." Ex. 1 [Box Tr.] at 184:15-185:14; Ex. 2 [Saab Tr.] at 65:15-23. Indeed, in an email produced by Meltwater and attached as Exhibit 54, a Meltwater witness observed that violating a site's terms of use would be "illegal." *Id.* at MW0094366.

61. More specifically, Meltwater also confirmed that it expects its customers to comply with Meltwater's own terms of use. Ex. 2 [Saab Tr.] at 64:24-65:3 ("I think we have to trust our customers to comply with the terms of use."), 74:23-75:2 ("Q: Would you expect, Ms. Saab, that if Meltwater generated terms and conditions that it gave to customers, that it would do so expecting that customers would comply with those terms and conditions? A: Yes."), 75:3-18 ("Our clients are companies. [A]nd I would expect that they [know] . . . how to deal with Ts and Cs, and that . . . we should be able to trust them to comply with them."); Ex. 1 [Box Tr.] at 184:22-185:3 ("[Y]es, of course, we would expect and hope clients follow the terms of use.")

62. Section 9 of the Long-Form Terms of Use states that the Meltwater customer "should review any applicable terms and privacy policy of any Third Party Site before using it or sharing any information with a Third Party Site." Ex. 51. Similarly, Section 8 of the Short-Form Terms of Use states that the Meltwater customer "is responsible for evaluating whether to access or use a Third Party Site and agrees to be bound by any applicable terms found therein." Ex. 52.

63. In both the Short-Form and Long-Form Terms of Use, Meltwater requires its customers to agree that they "will not copy, reproduce, distribute, transmit, broadcast, modify, display, sell, license, or otherwise exploit third-party content except in strict compliance with the rights, if any, granted to customer by any third party." Ex. 51, Section 9; Ex. 52, Section 8.

Meltwater's witness testified that she understood this particular term to mean that "our customers should comply with . . . copyright laws." Ex. 2 [Saab Tr.] at 76:4-12.

64. Although Meltwater instructs its customers to abide by the terms of use at third-party websites, Meltwater does not follow those instructions. It admits that its engineers do not review a third-party website's terms of use when configuring the Meltwater system to crawl that site for content. Meltwater's technology witness testified that when configuring the Meltwater system to crawl a source website, the site's terms of use page "is not [something] the source engineer would look at." Ex. 3 [Geidies Tr.] at 176:17-178:3. This is so despite the fact that Meltwater's source configuration guide instructs its engineers to visit the website of any new source to confirm the accuracy of the source's name. See Ex. 45 at MW0126220.

65. Meltwater contends that it can scrape and sell content from a site even if the terms of use explicitly prohibit crawling or scraping content from the site, based on Meltwater's belief that its actions constitute fair use. Ex. 2 [Saab Tr.] at 148:6-149:1 ("A snippet, I would not think, is a violation of this kind of terms of service."); 293:11-19 ("[W]hen it comes to Meltwater News, this headline snippet system . . . that's something we have done under the banner of fair use. . . . "[G]iven that fair use is kind of ill defined in general, it's something that we felt is our interpretation of fair use.")

66. In a section titled "Data Use and Restrictions," both forms of Meltwater's terms of use instruct the user that the user's license "does not include any resale of *any portion* of the Site or its contents; any collection and use of any derivative of this Site or its contents . . . or any use of data mining, robots, or similar data gathering or extraction tools." Ex. 51, Section 23; Ex. 52, Section 18 (emphasis added). Meltwater's witness testified that she understood this term to mean that users "should not be reselling [the Meltwater] system." Ex. 2 [Saab Tr.] at 76:25-77:0.

67. The terms of use further state: “This Site or any portion of this Site may not be reproduced, duplicated, copied, sold, resold, visited, or otherwise exploited for any purpose inconsistent with the limited rights granted to Customer under this Agreement.” Ex. 51, Section 23; Ex. 52, Section 18. Meltwater’s witness testified that if a Meltwater customer were to resell its Meltwater agent results to a third party, that would be “infringement” and failure to comply with Meltwater’s terms of use. Ex. 2 [Saab Tr.] at 84:5-13. In sum, Meltwater restricts its customers from engaging in the very same activities its business is built on, notwithstanding that the sites it crawls for content contain similar restrictions.

68. On at least one occasion, Meltwater has looked to the terms of use on a news website to determine what activity by a media monitoring service is allowed. In an email to Meltwater employees John Box and David Fallon, Meltwater News product lead Sara Saab came to the conclusion that its competitor Vocus either had a license from the website or was using the full text of content from the *Billings Gazette* without authorization. Ms. Saab stated that “it is illegal to republish full-texts of articles commercially in the US without permission/license to do so,” pasting into her email a paragraph from the *Billings Gazette* Terms of Service indicating that reproduction of the site’s content is prohibited beyond a single copy for non-commercial use. Ex. 54. at MW0094366. The *Billings Gazette* Terms of Service referenced and reproduced in Ms. Saab’s email do not distinguish between the commercial use of “full text” versus excerpts of articles. See *id.*

69. As set forth more fully in the Cross Declaration, all or virtually all of AP’s members post terms of use governing access to their news websites. In keeping with the Digital Use Agreement for AP members, it is the custom and practice of AP members to include terms

forbidding commercial use of news stories in their terms of use. Many AP member websites also explicitly forbid automatic crawling of their site content. Cross Decl. ¶ 19.

MELTWATER'S USE OF AP CONTENT

70. As set forth more fully in paragraphs 73 to 87 below, the evidence produced by Meltwater in this action demonstrates that Meltwater scraped each of the Registered Articles from a website, indexed the content of that Registered Articles in its database, and distributed content from that Registered Articles to at least one customer – and almost always many more.

71. Meltwater alleges that its web crawlers “extract and download” content from the news sources that the crawlers visit. Ex. 6, Meltwater Interrogatory Response No. 3. As explained in its Interrogatory response, the web crawlers then put the extracted content into an XML format and hand the content over to a series of indexing processes. During the indexing process, the content extracted from the web sites is compressed and stored in a “Repository Files” data store, mapped to a unique Doc ID. *Id.* The documents are de-duplicated, and the indexing server creates an index of where each word in any given article appears. While Meltwater has stated that very common words (such as “the” and “it”) are not indexed (*id.*), it has confirmed that these common words still appear in the opening text and hit sentence that is distributed to a customer in a News Report or ad hoc search result. Ex. 3 [Geidies Tr.] at 103:5-9.

72. Meltwater News is a closed system, meaning that AP is unable to view Meltwater’s use of AP content. Meltwater’s 30(b)(6) representative admitted that a news website cannot determine what content from its site has been displayed or delivered by Meltwater News to its customers, except in the rare instance that the link has been clicked. See Ex. 3 [Geidies Tr.] at 248:22-252:10 (“I can’t think of a way how they could determine that other

than when a link is clicked.”). Further, since AP is not publishing its stories itself, it would not receive any notification of use of its content.

73. In response to AP’s requests for “all Media Monitoring Materials containing article results from any of the Registered Articles” and “all documents evidencing any portion of any of the Registered Articles saved in a customer archive,” Meltwater created two Excel spreadsheets reflecting use of the Registered Articles in the Meltwater database. Ex. 2 [Saab Tr.] at 310:24-311:2. Attached as Exhibit 55 is a disc containing the native version of the Excel spreadsheet produced by Meltwater at MW0127907. Exhibit 55 contains 19 separate tabs, each reflecting Meltwater’s use of one of the original 19 Registered Articles. The tabs are named for the corresponding exhibits to AP’s Amended Complaint (“Am. Cplt.”). Attached as Exhibit 56 is a disc containing the native version of the Excel spreadsheet produced by Meltwaer at MW0128008. Exhibit 56 contains 14 separate tabs, each reflecting Meltwater’s use of one of the 14 Registered Articles added in AP’s Amended Complaint. The tabs are named for the corresponding exhibits to the Amended Complaint. (Exhibits 55 and 56 shall be collectively referred to as the “Spreadsheets.”)

74. The Spreadsheets show “Meltwater-indexed versions of the [Registered Articles].” Ex. 2 [Saab tr.] at 309:10-12. Saab testified that in crafting the searches to create the Spreadsheets, she “applied as many principles of common sense as [she] could,” including by choosing “fairly distinguishing sentences” to target the Registered Articles in the Meltwater database. *Id.* at 331:22-332:1.

75. The top portion of each tab in the Spreadsheets is a “Sources” table showing each website from which Meltwater scraped content corresponding to that Registered Article. Ex. 2 [Saab Tr.] at 313:7-314:17. For example, the tab named “Exhibit GG” in Exhibit 56 reflects

Meltwater's records of the Registered Article titled "Judges seem wary of overruling tobacco judgment." Meltwater's spreadsheet reports that it scraped this particular article from 258 individual sources (i.e., websites) – which is consistent with the fact that the same AP articles routinely will be published by hundreds of its member sites. See *id.* at Column A, lines 4-261.

76. The first column of the table contains a "document ID," which is a unique identifier for that particular article from that particular source. Ex. 2 [Saab Tr.] at 314:22-24. The "source" column lists the website from which Meltwater obtained the article indexed in the Meltwater database. *Id.* at 316:13-24. The date, which is displayed in the format day/month/year, refers to the date and time listed in the article if available, and otherwise reflects the date and time that the article was scraped from the source. The "title" column contains the article name and a hyperlink to the source. The "URL" column indicates the web page where the story was published on the Internet by that particular source at the time it was scraped by Meltwater. *Id.* at 322:21-323:2.

77. The Spreadsheets produced by Meltwater demonstrate that Meltwater scraped each of the Registered Articles from the websites of numerous AP members and associate members. (A list of AP members and associate members is attached to the Cross Declaration as Ex. 1.) The Spreadsheets also demonstrate that Meltwater scraped the Registered Articles from numerous AP licensees, including Yahoo News (see, e.g., Ex. 55 at Tab "Exhibit F," Line 16; Tab "Exhibit H," Line 7; Tab "Exhibit L," Line 34). The Spreadsheets further demonstrate that Meltwater scraped the Registered Articles from URLs belonging to AP Hosted, where content was hosted by AP for members paying for its hosted content service (see, e.g., Ex. 56 at Tab "Exhibit Y," Line 96; Tab "Exhibit JJ," Line 201). See Cross Decl. ¶¶ 17-18.

78. All told, the Spreadsheets reveal that for the Registered Articles alone, Meltwater is scraping content from close to 1,200 websites publishing AP content that are operated by AP members or other licensees. A spreadsheet created by our firm reflecting a list of all of Meltwater's "sources" for the AP Registered Articles contained in the Spreadsheets, with duplicates removed, is attached as Exhibit 57.

Meltwater's Evidence Establishes that Thousands of Extracts from AP Articles Were Delivered to Meltwater Customers

79. For each Registered Article published within six months of the date Meltwater compiled its Spreadsheets, the Meltwater Spreadsheets include a table referred to as the "Agent Shards" Table. (The Agents Shards Table is under a light pink banner.) The Agent Shards Table shows Meltwater's records of the hits on news articles delivered or otherwise made available to its customers within the Meltwater platform in response to the customer's standing agents, organized by customer. Ex. 2 [Saab Tr.] at 340:10-343:10. In other words, it demonstrates the relevant hits within Meltwater's database of "Agent Shard Data," which contains results for all customer agents within the past seven months. *Id.* at 340:10-342:25, 368:14-370:2.

80. The Agent Shard Table identifies the actual text of the AP stories delivered or otherwise made available to each Meltwater customer in its agent tab on the Meltwater platform. The "opening text (ingress)" column shows the opening text provided to the customer along with the headline of the article. *Id.* at 345:20-346:5. The "match sentence (hit sentence)" column shows the additional "contextual" text provided to the customer, which surrounds some of the customer's match keywords. *Id.* at 346:6-15.

81. The Agent Shards Table also reveals the number of times excerpts from each Registered Article were delivered or otherwise made available to U.S. customers in the agent tab of the Meltwater platform. *Id.* at 343:1-10. Attached as Exhibit 58 is a table prepared by our

firm showing, for each of the Registered Articles, the total number of times excerpts from that article were made available to Meltwater customers as set forth in the Spreadsheets. For example, Tab “Exhibit GG” of the Spreadsheets shows that 2,376 excerpts of this particular Registered Article were delivered or otherwise made available to Meltwater customers in the United States within the Meltwater platform. *Id.* In total, the Spreadsheets show that for these 33 Registered Articles alone, Meltwater delivered or otherwise made available at least 22,297 excerpts to U.S.-based customers. See *id.* If you consider that AP publishes over 1,000 articles each day (see Kent Decl. ¶ 3), it is easy to extrapolate that Meltwater is distributing hundreds of thousands of excerpts of AP articles, if not more, on an annual basis.

82. Yet, even these numbers may be lower than actual use of AP content. First, Meltwater produced various News Reports that suggest that the Agent Shards Table does not provide a complete record of the number of times each Registered Article was delivered to a U.S. Meltwater customer in the Meltwater platform. For example, the tab for Exhibit K in Ex. 55 indicates five “instances” in which the Registered Article titled “Albert King gets marker on Mississippi Blues Trail / Late singer and guitarist Albert King honored with Mississippi Blues Trail marker in Indianola” (“Albert King Article”) was delivered or otherwise made available to a Meltwater customer under its agent tab. However, Meltwater produced at least 58 separate email News Reports containing excerpts from this Registered Article. These include multiple News Reports sent to at least 13 individuals with email addresses from the Mississippi Development Authority (@mississippi.org), while the Agent Shard Table only lists a single entry for this customer with one email address: esmith@mississippi.org. Furthermore, the emailed News Reports produced by Meltwater indicate that excerpts from this Registered Article were delivered to esmith@mississippi.org from multiple website sources, rather than the single

website source indicated in the Spreadsheet. Attached as Exhibit 59 are pages from a December 13, 2011 Meltwater News Report sent to esmith@mississippi.org, containing excerpts from this Registered Article (excerpts have been highlighted). Meltwater's production also includes emailed News Reports for this Registered Article sent to a customer who is not listed at all in the Agent Shard Table for this Registered Article. Attached as Exhibit 60 are pages from a December 13, 2011 Meltwater News Report sent to todd.mitchell@crossmark.com, containing excerpts from this Registered Article (excerpts have been highlighted).

83. Second, the Agent Shards Table includes hits in response to customers' standing agents, but it does not include hits returned in response to ad hoc queries.

84. Meltwater did not retain ad hoc search results as part of its litigation hold. Ex. 2 [Saab Tr.] at 203:20-204:14. As a result, the Registered Articles may have been displayed to users more times than the Spreadsheets represent, including the display of additional hit sentences for each Registered Article. *Id.* at 201:4-12.

85. Third, the actual amount of AP content from the Registered Articles that were delivered or made available to Meltwater's customers is no doubt even higher since Meltwater's Agent Shards Database – which provides the data for the Agent Shards Table – only retains the past seven months of results. *Id.* at 368:14-370:2.

86. For this same reason, the Spreadsheets do not show the article excerpts contained in the Meltwater Media Monitoring Materials for those Registered Articles published more than seven months prior to this lawsuit – namely, the Registered Articles attached as Exhibits I, M, O, T, U, V, DD, EE, FF, and KK to the Amended Complaint. As Meltwater's witness testified “[t]here could well have been hits on those articles that would not be reflected in the [Spreadsheets].” Ex. 2 [Saab Tr.] at 370:3-19. However, Meltwater has produced News Reports

demonstrating that it distributed excerpts from each of these older Registered Articles to at least one Meltwater customer – and often, many more.

- a. Attached as Exhibits 61-62 are examples of Meltwater News Reports produced by Meltwater and emailed to Meltwater customers, in which excerpts from the Registered Article titled “Former Alaska Sen. Ted Stevens dies in plane crash / Former Alaska Sen. Ted Stevens dies in plane crash during fishing trip” have been highlighted. See Ex. 61 at pp. 4, 9; Ex. 62 at pp. 1-2.
- b. Attached as Exhibits 63-64 are examples of Meltwater News Reports produced by Meltwater and emailed to Meltwater customers, in which excerpts from the Registered Article titled “Senate upset erases Alaska seniority/ Alaska loses long-held Senate seniority that brought billions of dollars to state” have been highlighted. See ex. 63 at pp. 2-4; Ex. 64 at p. 2.
- c. Attached as Exhibits 65-66 are examples of Meltwater News Reports produced by Meltwater and emailed to Meltwater customers, in which excerpts from the Registered Article titled “Cold night crept by after crash killed senator / Survivors of Alaska plane crash that killed former U.S. senator spent cold night amid wreckage” have been highlighted. See Ex. 65 at pp. 1, 3-4, 11; Ex. 66 at p. 37.
- d. Attached as Exhibits 67-68 are examples of Meltwater News Reports produced by Meltwater and emailed to Meltwater customers, in which excerpts from the Registered Article titled “Young office says he’s cleared

in DOJ probe / Alaska congressman's office says he's cleared in Justice Dept. probe" have been highlighted. See Ex. 67 at pp. 6, 10, 12; Ex. 68 at p. 25.

- e. Attached as Exhibits 69-70 are examples of Meltwater News Reports produced by Meltwater and emailed to Meltwater customers, in which excerpts from the Registered Article titled "Senator delivered billions for Alaska's future / Alaska Sen. Stevens called Internet 'series of tubes,' but was 'Uncle Ted' to constituents" have been highlighted. See Ex. 69 at pp. 2, 5; Ex. 70 at pp. 2-3, 6.
- f. Attached as Exhibits 71-72 are examples of Meltwater News Reports produced by Meltwater and emailed to Meltwater customers, in which excerpts from the Registered Article titled "Alaska reviewing case against ex-VECO CEO Allen / State attorney general says Alaska officials reviewing case against former VECO CEO" have been highlighted. See Ex. 71 at p. 1; Ex. 72 at p. 14.
- g. Attached as Exhibits 73-74 are examples of Meltwater News Reports produced by Meltwater and emailed to Meltwater customers, in which excerpts from the Registered Article titled "Jimmie Johnson can't be bothered by talk of hexes / Jimmie Johnson dismisses all talk of a magazine cover jinx as he bids for a 6th straight title" have been highlighted. See Ex. 73 at p. 7; Ex. 74 at p. 6.
- h. Attached as Exhibits 75-76 are examples of Meltwater News Reports produced by Meltwater and emailed to Meltwater customers, in which

excerpts from the Registered Article titled “7 accused of \$375M Medicare, Medicaid fraud / Texas medical group owner among 7 indicted in alleged \$375 million health care fraud scheme” have been highlighted. See Ex. 75 at p. 6; Ex. 76 at p. 18.

- i. Attached as Exhibits 77-78 are examples of Meltwater News Reports produced by Meltwater and emailed to Meltwater customers, in which excerpts from the Registered Article titled “Employers boost 401(k)s to meet workers’ demand / Companies beef up and expand their 401(k) plans to hire and retain productive employees” have been highlighted. See Ex. 77 at pp. 1-2; Ex. 78 at pp. 1-2.
- j. Attached as Exhibits 79-80 are examples of Meltwater News Reports produced by Meltwater and emailed to Meltwater customers, in which excerpts from the Registered Article titled “LA pastor sentenced to 15 years in Medicare fraud / Los Angeles pastor sentenced to 15 years in \$14.2 million Medicare fraud scheme” have been highlighted. See Ex. 79 at p. 12; Ex. 80 at pp. 1-2.

87. In sum, the Spreadsheets, along with the News Reports for the Registered Articles, show that Meltwater’s database of content contains each of the Registered Articles. Further, the Spreadsheets show that Meltwater copied each of the Registered Articles by crawling at least one – and often many – websites where the article was published by an AP member or licensee. Ex. 2 [Saab Tr.] at 377:12-21 (confirming her recollection that “there were some index documents which I judged to correspond to each of the registered articles”). Additionally, as Meltwater’s witness conceded, for all of the recently published Registered

Articles, the Agent Shard Table of the Spreadsheets confirms that “the registered articles corresponded to documents within Meltwater that were responsive to . . . agent search queries of U.S. customers.” *Id.* at 376:11-378:20. In other words, excerpts from all of these articles were made available to Meltwater customers. Finally, the Spreadsheets and the News Reports together show that Meltwater distributed or otherwise made available to its customers the headline and opening text of each Registered Article, along with a hit sentence from the body of that Registered Article containing the user’s agent keyword. *Id.* at 377:22-379:13.

88. Even after this litigation was filed, Meltwater has continued to scrape AP content from AP member and licensee sites – as well as from AP’s own AP Hosted pages – and to deliver AP content to its customers. Ex. 1 [Box Tr.] at 329:11-330:10. In fact, 11 of the Registered Articles were scraped and distributed by Meltwater after the original Complaint was filed and served. *See* Ex. 56.

AP Articles Were Included in Newsletters

89. In addition to the delivery to Meltwater customers of thousands of excerpts from AP articles that are reflected in the Spreadsheets, Meltwater admits that excerpts from the Registered Articles were included in ten email newsletters created by Meltwater News customers in the United States. One newsletter contained an excerpt from the article titled “WikiLeaks suspect seen as hero, traitor / Soldier charged in WikiLeaks case seen as hero or traitor, depending on who you ask” (Am. Cplt. Ex. X). Attached as Exhibit 81 is the Declaration of Sara Saab dated July 26, 2012; see *id.* at ¶ 3. The other nine newsletters contained excerpts from the article titled “FBI director: Cyber-threats will become top worry / FBI director: Cyber-threats will someday top terrorism as leading national security worry” (Am. Cplt., Ex. JJ). Attached as Exhibit 82 is the Second Declaration of Sara Saab dated September 4, 2012; see *id.* at ¶ 3.

90. Meltwater was unable to state whether customers had used any of the Registered Articles in newsfeeds because of its failure to preserve the relevant evidence. In the Meltwater system, if a user selects an excerpt of an article for inclusion in a newsfeed and later removes or “deselects” it -- for example if the customers wants to update its newsfeed to include more current article excerpts -- Meltwater does not keep records reflecting the previous use of the article. Ms. Saab testified that “there’s no record of previous selections for the news feed which are no longer included in the news feed.” Ex. 2 [Saab Tr.] at 336:10-13. Ms. Saab continued:

Ms. STEINMAN: So Meltwater was really unable to determine historically whether any of its customers had put the AP registered articles in their news feed? They could only tell basically at the time that you did the report whether those articles were up on somebody’s news feed, correct?

...

A That’s right.

Meltwater concedes that it is “possible that there could be one or more [R]egistered [A]rticles in an automatic news feed.” *Id.* at 338:6-17.

Meltwater’s Click-Through Data Shows Little Evidence That Meltwater is Driving Customers to AP Member Sites

91. Because Meltwater is seemingly not concerned as to whether its News Reports do, or do not, drive traffic to news sites, Meltwater does not maintain click-through rates for its U.S. operations as a whole. Ex. 2 [Saab Tr.] at 125:4-9 (“[W]e cannot tell what the click-through rate is. It’s not something we track and – within our business. It’s not really of interest internally.”) In response to AP’s requests for the click-through rate for Meltwater’s U.S. operations – or the data necessary to determine such a rate – Meltwater produced the total number of clicks by U.S. customers over a six-month period but not the total number of article hits delivered to U.S. customers. *Id.* at 123:7-18, 123:23-124:6 (“We know that there were X

number of clicks by U.S. customers. What we don't know is out of how many.") Meltwater's technical witness testified that based on his "general knowledge around the system and around the production environment," this number could be determined by writing a software program that would need approximately "24 to 36 hours" to run. Ex. 3 [Geidies Tr.] at 256:19-260:5.

92. Meltwater did produce click-through rates on an article-specific basis for the Registered Articles. This data is presented in the Spreadsheets, on the tabs relating to each article for which such data exists. For 26 of the 33 Registered Articles, Meltwater represents that it does not have a record of *any* clicks on those articles. Ex. 2 [Saab Tr.] at 365:7-19. In other words, the click-through rate was zero for these 26 articles.

93. Meltwater produced click-through rates for the remaining seven (7) of the 33 Registered Articles in the Spreadsheets, as set forth in Paragraph 94(a)-(g) below. Based on the data produced by Meltwater, the average click-through rate across all of the Registered Articles is about 0.08%, or less than one-tenth of one percent. This figure is consistent with the 0.5% click-through rate determined in the United Kingdom. There, in connection with proceedings commenced by the Newspaper Licensing Agency ("NLA") against Meltwater, the Court considered data produced by Meltwater to determine "the number of times a recipient of a Meltwater text snippet selects the link provided and clicks through the newspaper's website to read the article." The resulting "click-through" rate was approximately 0.5 percent. The Tribunal went on to state that figure "indicates that users of Meltwater's service do not generally use it in order to actually go on and read many of the underlying articles referred to in a Monitoring Report." Attached as Exhibit 83 is a copy of the U.K. Copyright Tribunal's February 14, 2012 decision; see *id.* at ¶¶ 85-87.

94. Meltwater testified that the click-through rate for the seven Registered Articles that actually evidenced any “clicks” can be derived by dividing the number of clicks by the number of hits delivered. Ex. 2 [Saab Tr.] at 366:21-367:1

- a. For the article titled “AP Exclusive: Inside Romania’s secret CIA prison,” Meltwater recorded two article clicks out of 134 instances where the article was distributed to U.S. users in the Meltwater platform in response to their standing agents. Both clicks were by the James Mintz Group, AP’s counsel’s agent, while the James Mintz Group was investigating Meltwater prior to this lawsuit. Even taking these clicks into account, this yields a click-through rate of 1.5% for this article. If one excludes Mintz, the click-through rate for this article is zero. See Ex. 55, Tab “Ex. N,” Line 219, Column S.
- b. For the article titled “When the most wonderful day of the year comes late,” Meltwater recorded a single article click out of 3,081 instances where the article was distributed to U.S. users in the Meltwater platform in response to their standing agents. This yields a click-through rate of 0.03% for this article. See Ex. 55, Tab “Ex. W,” Line 287, Column R.
- c. For the article titled “Wikileaks suspect seen as hero, traitor,” Meltwater recorded a single article click out of 1,668 instances where the article was distributed to U.S. users in the Meltwater platform in response to their standing agents. This yields a click-through rate of 0.06% for this article. See Ex. 55, Tab “Ex. X,” Line 338, Column P.

- d. For the article titled “Northeast Utilities, NStar close \$5B deal,” Meltwater recorded a single article click out of 2,917 instances where the article was distributed to U.S. users in the Meltwater platform in response to their standing agents. This yields a click-through rate of 0.03% for this article. See Ex. 56, Tab “Ex. Y,” Line 311, Column G.
- e. For the article titled “Apple lent weight to dividend comeback in 1Q,” Meltwater recorded a single article click out of 1,552 instances where the article was distributed to U.S. users in the Meltwater platform in response to their standing agents. This yields a click-through rate of 0.06% for this article. See Ex. 56, Tab “Ex. BB,” Line 97, Column K.
- f. For the article titled “7 accused of \$375M Medicare, Medicaid fraud,” Meltwater recorded twelve (12) article clicks out of 1,313 instances where the article was distributed to U.S. users in the Meltwater platform in response to their standing agents. This yields a click-through rate of 0.91% for this article. See Ex. 56, Tab “Ex. EE,” Line 154, Column M.
- g. For the article titled “Things are looking up for state budgets,” Meltwater recorded three (3) article clicks out of 2,361 instances where the article was distributed to U.S. users in the Meltwater platform in response to their standing agents. This yields a click-through rate of 0.13% for this article. See Ex. 56, Tab “Ex. II,” Line 204, Column P.

Meltwater News Reports Rely Heavily on AP Content and Substantial Portions of Articles Are Delivered

95. News Reports produced by Meltwater indicate that the content that Meltwater delivers appear to draw heavily from AP articles. Attached as Exhibit 84-86 are examples of

News Reports produced by Meltwater demonstrating that well over a third of some reports derive from AP designated content.

96. Meltwater scrapes and distributes any AP content that its crawlers pick up from its source base, regardless of whether that content is available for licensing to non-AP members. For example, as set forth more fully in the Cross Declaration, several of the Registered Articles derive from the state wires that are contractually restricted to AP members. Cross Decl. ¶ 51. Despite the fact that these stories are not available for licensing to non-members for distribution at the time of publication, Meltwater scraped these stories from AP member sites and delivered them to their customers within 10 minutes of publication of when the articles were originally published. *See, e.g.*, Ex. 55 at Tab “Ex. K,” Column H, Lines 46 and 47.

97. Meltwater admits that it delivers the same amount of text – the headline, the opening text of up to 300 characters, and a hit sentence of up to 140 characters – regardless of the length of the underlying article. Ex. 2 [Saab Tr.] at 184:21-185:10. For short, breaking news articles by AP, Meltwater’s delivery to customers of the headline, lede and hit sentence can constitute a substantial percentage of the article text. For example:

a. In response to an agent called “Economic Development,” Meltwater customer the City of Cincinnati received the following opening text and hit sentence from the body of the article “Help wanted at new casino for Toledo, Ohio”:

Job seekers can roll the dice to land work at another of the four casinos coming soon to Ohio. Hollywood Casino Toledo has posted more than 600 job listings on its website this week. . . . Monday, while the Columbus casino posted openings for executive positions. Cincinnati also is getting a casino. All four were approved by Ohio . . . ¹

¹ Any HTML formatting code appearing in the Spreadsheets has been removed for all excerpts reproduced in Paragraphs 97 and 99.

See Ex. 55, Tab “Ex. G,” Line 62, Columns D & E. Together, the opening text and hit sentence make up 53% of the article text. A copy of this Registered Article, highlighted to show the excerpts above, is attached as Exhibit 101.

- b. In response to an agent called “Competitors for Plug Ins News,” Meltwater customer Nik Software, Inc., received the following opening text and hit sentence from the body of the article titled “Modern pentathlon tightens anti-doping policy”:

Modern pentathlon has joined other sports in adopting a “no needles” policy as part of its anti-doping rules ahead of the 2012 London Olympics. . . says athletes can receive injections only from a “certified medical professional” after an appropriate diagnosis and only if there is no alternative.

See Ex. 55, Tab “Ex. J,” Line 41, Columns D & E. Together, the opening text and hit sentence make up 61% of the article text. A copy of this Registered Article, highlighted to show the excerpts above, is attached as Exhibit 102.

- c. In response to an agent called “Hearsay Social,” Meltwater customer Bluepoint Venture Marketing received the following opening text and hit sentence from the body of the article titled “Albert King gets marker on Mississippi Blues Trail”:

The late guitarist and singer Albert King is being honored on the Mississippi Blues Trail. A marker commemorating King’s career is being dedicated Tuesday in Indianola. . . . year of birth sometimes as 1923 and sometimes as 1924. Applying for a Social Security card in 1942, he listed his name as Albert Nelson. When . . .

See Ex. 55, Tab “Ex. K,” Line 47, Columns D & E. Together, the opening text and hit sentence make up 40% of the article text. A copy of this Registered Article, highlighted to show the excerpts above, is attached as Exhibit 103.

d. In response to an agent called “Immigration,” Meltwater customer National Immigration Forum received the following opening text and hit sentence from the body of the article titled “Wednesday is 1-year mark of border agent’s death”:

Wednesday marks one year since Border Patrol Agent Brian Terry was killed in a shootout with a crew of border outlaws in the Arizona desert. The 40-year-old former Marine and a native of Detroit was a member of an elite Border Patrol unit and came across the bandits while on patrol Dec. . . . connected to a botched federal operation known as Fast and Furious in which illegally obtained weapons were allowed across the border into Mexico.

See Ex. 55, Tab “Ex. Q,” Line 35, Columns D & E. Together, the opening text and hit sentence make up 61% of the article text. A copy of this Registered Article, highlighted to show the excerpts above, is attached as Exhibit 104.

e. In response to an agent called “Georgia Search,” Meltwater customer Associated Wholesale Grocers, Inc., received the following opening text and hit sentence from the body of the article titled “Shoplifter chops off Wash. security guard’s ear”:

Police in Washington state say a shoplifter with a hatchet sliced off most of a store security guard’s ear. Longview police Sgt. Doug Kazensky tells The Daily News that the shoplifter pulled a small hatchet out of his waistband Monday afternoon and swung, chopping off nearly the

entire ear. . . . place just outside the garden center entrance of a Fred Meyer supermarket. Kazensky says two security officers were trying to apprehend the man . . .

See Ex. 55, Tab “Ex. S,” Line 344, Columns D & E. Together, the opening text and hit sentence make up 61% of the article text. A copy of this Registered Article, highlighted to show the excerpts above, is attached as Exhibit 105.

f. In response to an agent called “Headstrong – Global Press,” Meltwater customer Headstrong Corporation, received the following opening text and hit sentence from the body of the article titled “Illinois House approves early prison release plan”:

Illinois lawmakers are telling Gov. Pat Quinn to reduce prison crowding with a new early release program. The House voted 68-50 Thursday to reinstate sentence credits for prisoners who stay out of trouble behind bars or participate in self-improvement programs. . . . says her plan won't lead to another scandal. It allows disqualifying violent prisoners and giving credit for programs completed in county jail.

See Ex. 56, Tab “Ex. AA,” Line 39, Columns C & D. Together, the opening text and hit sentence make up 51% of the article text. A copy of this Registered Article, highlighted to show the excerpts above, is attached as Exhibit 106.

98. Meltwater’s default delivery of the opening text in addition to the hit sentence contrasts with AP licensee Google News, which delivers only a short excerpt containing the user’s selected keyword through its Google Alerts tool. Jones Decl. ¶ 52. The amount of text delivered routinely to Meltwater customers also exceeds the amount allowed under Meltwater’s license agreement with the *Financial Times*, which places the maximum article excerpt (defined

in the agreement as “teaser text”) at 140 characters. Attached as Exhibit 87 is a copy of the June 1, 2010 agreement between Meltwater and the *Financial Times* and a July 7, 2011 letter amendment to that agreement. See *id.* at MW0126306, § 1.16.

99. As set forth in paragraph 28, *supra*, Meltwater concedes that a user may receive multiple “hit sentences” from the same article. For example, Meltwater customer Lorillard, Inc. received two different hit sentences from the story titled “Judges seem wary of overruling tobacco judgment.” In response to the agent called “Tobacco Legislation and Regulation – US,” Lorillard received the following opening text and hit sentence from the body of the article:

A bid by tobacco companies to overrule a court judgment that they must do corrective advertising about the dangers of smoking is getting a chilly response from a federal appeals court. . . . Administration authority over the industry, including power to require graphic cigarette warnings. In a Justice Department lawsuit, Kessler ruled in . . .

Ex. 56, Tab “Ex. GG,” Line 547, Columns C & D. In response to the agent called “FDA, Legislation and Litigation,” Lorillard received the following opening text and hit sentence from the body of the same article:

A bid by tobacco companies to overrule a court judgment that they must do corrective advertising about the dangers of smoking is getting a chilly response from a federal appeals court. . . . Gladys Kessler’s order overturned because a 2009 law gave the Food and Drug Administration authority over the industry, including power to require . . .

Id., Line 734, Columns C & D. Both entries share the same “Document ID” of 2109539231, which corresponds to the source for this article hit. According to Line 16 of the same tab, this document ID indicates that the article was scraped from the Atlanta Journal-Constitution (AJC.com), an AP member. Together, the opening text plus these two hit sentences make up 49% of the article text. A copy of this Registered Article, highlighted to show the excerpts above, is attached as Exhibit 88.

Meltwater's Business in Canada and UK Survives With Delivering Significantly Less Copyrighted News Content

100. For stories scraped from Canadian sources, Meltwater delivers only the headline of that article. Ex. 2 [Saab Tr.] at 35:17-36:8; Ex. 1 [Box Tr.] at 150:10-15. Meltwater continues to have an ongoing business for Meltwater News in Canada. Ex. 2 [Saab Tr.] at 37:20-24. Similarly, in the United Kingdom, Meltwater displays a shorter excerpt than it displays in the United States. *Id.* at 37:7-11. Meltwater continues to have an ongoing business for Meltwater News in the United Kingdom. *Id.* at 37:15-19. Meltwater's 30(b)(6) witness confirmed that the Meltwater system is technologically capable of restricting the amount of content displayed based on identification of the source of that content. Ex. 3 [Geidies Tr.] at 72:15-23, 73:17-24.

LEGAL ACTIONS AGAINST MELTWATER NEWS

101. AP's suit is not the first time that the Meltwater News media monitoring service has been the subject of a copyright infringement lawsuit. In its original home country of Norway, the Oslo District Court found that the Meltwater News service violated Norwegian copyright law. Attached as Exhibit 89 is the publicly available English translation of the May 25, 2009 decision of the Oslo District Court in the case of *Meltwater News AS v. Mediebedriftenes Klaeringstjeneste AS*.

102. The Meltwater News service offered in the U.K. was the subject of several proceedings between Meltwater and the Newspaper Licensing Agency, a U.K. licensing body that represents over 1,300 national and regional newspapers in the United Kingdom. In 2009, the NLA introduced a licensing framework for media monitoring organizations that required a license from the media monitoring company ("Web Database License") and a license for end-users ("Web End-User License"). Meltwater commenced a proceeding in the U.K. Copyright

Tribunal challenging the licensing scheme. The NLA then commenced proceedings in the High Court of Justice, Chancery Division, for a declaration that both Meltwater and its customers required a license for the Meltwater News service.

103. In the course of these proceedings, Meltwater agreed that it would enter into the Web Database License covering its own activities. Ex. 83, Copyright Tribunal ¶ 14, High Court ¶ 17. In a September 12, 2011 press release (attached as Exhibit 90), Meltwater acknowledged its agreement to pay this monitoring license in public statements. *See id.* (“Although disagreeing in principle, Meltwater has agreed to take the license required of monitors like itself.”) Nonetheless, Meltwater pressed forward with the action on behalf of its end-users. Ultimately, the UK High Court found that an end-user license was required, and the UK Court of Appeals affirmed that decision. (A copy of the November 26, 2010 decision from High Court of Justice, Chancery Division, in the matter of *The Newspaper Licensing Agency Limited et al v. Meltwater Holding BV et al*, is attached as Exhibit 91. A copy of the July 27, 2011 decision from the U.K. Court of Appeal (Civil Division) in the matter of *The Newspaper Licensing Agency Limited et al v. Meltwater Holding BV et al* is attached as Exhibit 92.)

104. Subsequently, the U.K. Copyright Tribunal issued a decision regarding the amounts to be paid under the licensing scheme. See Ex. 83.

COMPETING WITH AP FOR CUSTOMERS

105. Evidence produced by Meltwater suggests that AP and Meltwater have competed directly for the same customer accounts – and in some cases, an AP customer has cancelled its AP subscription in favor of Meltwater.

106. As set forth in the Cross Declaration, the Mississippi Development Authority had been an AP customer since 2002 until terminating its AP account effective February 2009. Cross

Decl. ¶ 55. At the time it cancelled its AP service, the Mississippi Development Authority was receiving the AP Mississippi State Wire and Daybook via AP Exchange, a subscription valued at approximately REDA annually. *Id.* On April 29, 2009, Paula Travis – the same billing contact for AP’s account with the Mississippi Development Authority – entered into an agreement with Meltwater for the Meltwater News Service, at a cost of \$6,000. Attached as Exhibit 93 is an email from Paula Travis to a Meltwater representative accepting the terms of a Meltwater order confirmation. The Mississippi Development Authority is still a Meltwater customer. Attached as Exhibit 94 are excerpts from Meltwater’s full list of current U.S. customers for Meltwater News, which was produced on July 19, 2012; see *id.* at MW0126646. The Mississippi Development Authority received the Registered Article titled “Albert King gets marker on Mississippi Blues Trail” from Meltwater News. See Ex. 55, Tab “Ex. K,” Line 46, Column M.

107. AP and Meltwater competed directly against one another during the bidding process for a contract with the U.S. House of Representatives in 2010. As set forth in the Rizzo Declaration, the U.S. House of Representatives was a longstanding AP customer at the time. Rizzo Decl. ¶ 16. In January 2010, Mr. Rizzo noted the presence of Meltwater representatives at a meeting for interested bidders for the House of Representatives contract for news information, identified as Solicitation No. OPR10000022 (Online News and Information Services). *Id.* ¶ 17. AP submitted a proposal to the U.S. House of Representatives in response to that Solicitation on March 17, 2010. *Id.* ¶ 18. Meltwater also submitted a proposal to the U.S. House of Representatives in response to the same Solicitation on April 5, 2010. Attached as Exhibit 95 is Meltwater’s proposal and cover email submitted to the U.S. House of Representatives in response to Solicitation No. OPR10000022, produced by Meltwater.

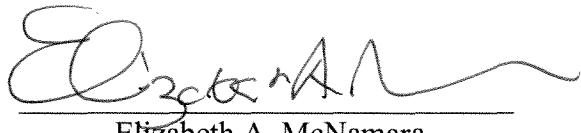
108. As set forth in the Cross Declaration, the New York State Department of Correctional Services was an AP customer receiving the Crime Alert, Metro Wire, and New York State Report until terminating its AP account effective March 2008. Cross Decl. ¶ 56. At the time the New York State Department of Correctional Services cancelled its service, its subscription was valued at approximately REDA on an annualized basis. *Id.* According to Meltwater's customer list, the New York State Department of Correctional Services is a current Meltwater customer. Ex. 94 at MW0126628. Based on documents produced by Meltwater, Meltwater appears to have offered a trial subscription to the New York State Department of Correctional Services as early as September 2006, and the New York State Department of Correctional Services appears to have been a Meltwater customer since approximately October 2007 – just a few months before that agency cancelled its AP service. Attached as Exhibit 96 is a screenshot from Meltwater's customer database produced by Meltwater showing the records of “sales stage” contacts with the New York State Department of Correctional Services by Meltwater sales representatives, as recorded in Meltwater's database; see *id.* at MW0129457 (including a September 13, 2008 entry of a “trial” and an October 31, 2007 entry that customer was “closed/won”). Meltwater's most recent contract with the New York State Department of Correctional Services, produced by Meltwater in this litigation, quotes an annual subscription fee of \$3,000. A copy of that November 17, 2011 contract is attached as Exhibit 97.

109. As set forth in the Rizzo Declaration, AP participated in contract proposals to the U.S. International Trade Commission in or around September 2009, which were submitted by its licensees Factiva and InfoDesk. Rizzo Decl. ¶ 20. According to documents produced by Meltwater, the International Trade Commission signed a 5-year subscription agreement with Meltwater News on April 30, 2009 and remains a current Meltwater customer. Attached as

Exhibit 98 is a copy of the April 30, 2009 contract between Meltwater News and the International Trade Commission for five years of Meltwater News service, produced by Meltwater. See also Ex. 94 at MW0126638.

110. As set forth in the Rizzo Declaration, the Department of Homeland Security, through its contractor M.C. Dean, cancelled a contract to receive AP's "Megastream" Product in October 2009. The representative from M.C. Dean told AP that he was cancelling the contract to switch to Meltwater. Rizzo Decl. ¶¶ 7-13. According to documents produced by Meltwater, M.C. Dean has been registered in the sales database as a prospective customer since at least October 2007. Attached as Exhibit 99 is a screenshot from Meltwater's customer database showing the records of "sales stage" contacts with M.C. Dean by Meltwater sales representatives, as recorded in Meltwater's database; see *id.* at MW0127915. According to documents produced by Meltwater, the Department of Homeland Security has been registered in the sales database as a prospective customer since at least June 2006. Attached as Exhibit 100 is a screenshot from Meltwater's customer database showing the records of "sales stage" contacts with the Department of Homeland Security; see *id.* at MW0127910. Meltwater denies that M.C. Dean has ever been a customer of Meltwater. However, Meltwater's 30(b)(6) witness testified that he "d[id]n't know whether [the Department of Homeland Security was] a client or not based on the information [he] was asked to look up." Ex. 1 [Box Tr.] at 276:8-15. Mr. Box further testified that not every proposal will necessarily be reflected in the customer database notes because "[s]ome people are a little lax when it comes to updating the notes." *Id.* at 279:18-24.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 9, 2012.



Elizabeth A. McNamara